

Title: Understanding Drainage Assessments

Division: Agriculture and Rural

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Table of Contents

1. [Introduction](#)
2. [Responsibilities Under Common Law](#)
3. [Responsibility Under the Drainage Act](#)
4. [Engineer's Report](#)

Introduction

The *Drainage Act* provides a legal procedure by which an "area requiring drainage" may have an outlet drain constructed to dispose of excess water. The drainage work is initiated by interested individuals within an "area requiring drainage" who will benefit from the construction of the drain.

A petition form, obtained from the municipal clerk, is signed by interested landowners. In order to be valid or sufficient, the petition must be signed by the majority of the owners in the "area requiring drainage" or by owners that represent at least 60% of the lands in this area. The "area requiring drainage" is usually described by lot and concession, or other legal land description. By taking this action, it is presumed that the owners signing the petition have made a decision that the drain will be of benefit to them and that the probable cost will be lower than the anticipated benefits. The initial benefit-cost decision is made at this point by the landowners, not the engineer or Council.

The petition is presented to and considered by Council. If the petition represents a proper "area requiring drainage", that is a real drainage basin, and appears to be valid, the Council may decide to proceed.

Council then notifies each of the petitioners of this decision as well as any other municipality affected and the local Conservation Authority and the Ministry of Natural Resources.

Council then appoints an engineer. The engineer is an employee of Council, hired to design this specific drain. Under *The Drainage Act*, Section 9(2), the engineer is required to hold an on-site meeting to determine (1) the area requiring drainage, (2) if the petition is valid, (3) the drainage needs of the area. The engineer is then required "to make an examination of the area requiring drainage as described in the petition and to prepare a report which shall include:

- (a) plans, profiles and specifications of the drainage works;
- (b) a description of the area requiring drainage;
- (c) an estimate of the total cost thereof;
- (d) an assessment of the amount or proportion of the cost of the works to be assessed against every parcel of land and road for benefit, outlet liability and injuring liability;
- (e) allowances, if any, to be paid to the owners of land affected by the drainage works and
- (f) such other matters as are provided for under this Act."

The engineer's report is presented to Council, who then notifies all persons assessed and calls a special meeting where the report is considered. General objections to the report may be raised at this time. At this meeting signatures may be added or removed from the petition and this determines if the project will continue. Unresolved problems, depending on the subject, may be appealed to the Court of Revision, the Ontario Drainage Tribunal or the Drainage Referee. Details on appeal procedures may be found in *The Drainage Act** or in Ontario Ministry of Agriculture and Food Factsheet, Drainage Legislation.

The engineer's report includes two important items:

1. The estimated cost of the work — No matter how individual assessments are arrived at, this total estimated cost must always be equal to the total amount assessed, otherwise the work cannot proceed.
2. The assessment liability — This may be spread over several pages if an owner owns several

parcels of land and if there are branch drains. It may be summarized.

Let us examine the obligations regarding this assessment.

**The Drainage Act may be found in the Revised Statutes of Ontario 1980, Chapter 126, available in most public libraries. Individual copies may be purchased from the Ontario Government Bookstore, 1-800-668-9938.*

| [Top of Page](#) |

Responsibilities Under Common Law

A natural watercourse is defined generally as a stream of water which flows along a defined channel, with bed and banks, for a sufficient time to give it substantial existence. This may include streams that dry up periodically.

A riparian landowner (owner of lands that abut upon a natural watercourse) has the right to drain his or her lands into the natural stream, but may not bring water in from another watershed. He or she can collect water in ditches and drains and discharge it into the watercourse even though it results in an increase in volume and rate of flow.

Where a natural watercourse becomes a part of a drain, it is no longer a natural watercourse. When this occurs, the riparian rights, as described earlier, are lost.

Surface water not flowing in a natural watercourse (i.e. not having discernible bed and banks) has no right of drainage. An owner of lower land may, at his or her own choice, either allow the water from higher land to flow over it or by dams or banks, keep such water off his or her property. No owner has the right to collect such surface water by ditches or drains and discharge it on lands of another. He or she has a responsibility to take this water to a sufficient outlet, i.e., a natural watercourse or a drain constructed under *The Drainage Act*.

Since there is no right to drain surface water, the owner of each parcel of land in the watershed is generally assessed for "outlet liability". In other words, his or her Common Law liability is removed by paying for the increased size or cost of the drain due to the volume of water which is discharged from his or her property, even though the drain may not provide a direct outlet for this water. The authority for this liability is set out in Section 23(1).

Since, through Common Law, a landowner is also liable for any damage he or she may cause from water which he or she collects in drains and discharges on other land without a sufficient outlet, he or she may be assessed for relief from such "injuring liability" if the new drain serves as an outlet for his or her drains and prevents this injury from occurring. The authority for this liability is set out in Section 23(2).

Injuring liability is frequently difficult to distinguish from outlet liability, consequently many engineers' reports do not contain such an item.

The assessment for outlet liability and injuring liability is based on the volume and rate of flow of the water artificially caused to flow from an owner's property. Generally, the assessment is based upon a unit value per hectare. Owners at higher elevations on a watershed may have a higher unit charge than those owners near the outlet since the water from their land makes use of a greater length of drain. A difference may be made in the unit outlet charge due to varying types of soil or land use, or the distance to the drain.

| [Top of Page](#) |

Responsibility Under the Drainage Act

In addition to the Common Law responsibility, an owner may also be assessed for benefit.

Benefit will vary between different lands, according to their differences of elevation, quantity of water to be drained from each, distance of undrained land from the course of the proposed ditch, and the presence or absence of existing drains, and other like factors.

To consider whether a parcel of land will receive any benefit from the construction, it is proper to consider whether any enhanced financial value will accrue to it as a result of the drain construction. This may occur through the increased productive power of the land or by rendering it more salable and at a better price, or by preventing water from entering on to it.

If the proposed drainage works can be of no possible benefit to the owner, or is of no commercial or agricultural value, the Act does not authorize a contribution for benefit.

Sometimes, an owner has an undeveloped area that he or she intends to leave in this condition. The owner may feel that he or she should not be assessed since the drain will be of no benefit. However, the property

could change hands and the new owner might want to drain and develop it. It is with this in mind that the engineer must make an assessment, regardless of the present owner's intentions. It is the duty of the engineer to determine whether or not a parcel of land will benefit from the project. When appealing a benefit assessment, the landowner must prove that the land does not benefit from the drain. An owner has no responsibility for work done upstream from his or her property unless the work provides a benefit by "cutting off" a harmful flow of water across the property. In some instances, a "special benefit assessment" may be levied against the property. This value usually represents the difference in cost between that which was originally designed and the increased level of design requested by a landowner. Examples include a closed or tile drain where open ditches would ordinarily suffice, or the construction of ponds beside the drain, or other special requests by a landowner specifically for this benefit. The authority for this liability is set out in Section 24.

| [Top of Page](#) |

Engineer's Report

The Engineer's report should contain a plan and profile of the drain, as well as details on the drain design and the assessment schedule.

The plan shows the location of drains and the limits of the watershed. The profile shows ground elevations along the drain and the present and proposed drain bottom. The specifications give details on how the drain is to be constructed.

The Schedule of Assessment contains several columns. The first group contains the names of owners with a description of each parcel of land assessed.

The hectarage shown in the schedule for which an owner is assessed is only approximate. No survey is made to accurately establish the watershed boundary or farm areas. Any minor error in hectarage assessed is not a valid basis for appeal nor does it greatly affect the assessment. The other columns in the Schedule set forth the assessment liability for each drain and/or branch drain. These values are only estimates. The final value will not be known until the construction work is finished. The assessment will then be prorated to recover the actual cost.

Allowances to lands injured by the work are set out in a separate schedule by the engineer as authorized in Sections 29 to 33 of *The Drainage Act*.

Damage to crops during construction and disposal of waste material will vary depending on the time of year that the work is constructed. Crop damage due to spreading the spoil on the banks is based on a decreasing yearly loss of crop over several years. All or part of the cost of access bridges from a public road to the property may be assessed to the property owner.

Farm bridges are constructed as a part of the work. In certain circumstances a severance allowance may be paid instead of building the bridge. The allowance will depend upon the value of the land severed, or the cost of the bridge that would be required. The cost, or part of the cost of farm bridges or the severance allowance may be assessed across the property.

Where private drains are incorporated into the new drain, a nominal allowance may be paid based on any saving that may result from using the private drain. These allowances may not be included in the Summary of Assessments but are usually shown in a separate Schedule of Allowances.